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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-124

EDWARD C. McINTYRE and
CONNIE ELLEN McINTYRE,
Petitioners,

vs.

EVEREST & JENNINGS, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners, Edward C. McIntyre and Connie Ellen McIntyre, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 13, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 575 F.2d 155 (8th Cir. 1978). The judgment and opinion of the District Court is unreported. The District's Judgment N.O.V. is unreported.

JURISDICTION

The judgment of the Court of Appeals which reversed the judgment of the District Court, was entered on February 13, 1978. Subsequently, the Court of Appeals entered an Order denying the Appellants/Cross-Appellees' Petition for Rehearing en Banc, on April 25, 1978. On May 5, 1978, Appellants/Cross-Appellees filed a Motion for Reconsideration of Petition for Rehearing en Banc. The Court of Appeals denied the Motion for Reconsideration by its Order of May 16, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. The jurisdiction of the District Court was based upon 28 U.S.C. §1332.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it held that in a products liability case the Plaintiffs could not recover on the theory of negligence when the jury verdict also contained a verdict for the Defendant on the issues of strict liability?

2. Did the Court of Appeals err in reversing the verdict for Plaintiffs on the issues of negligence because of an inconsistent verdict for the Defendant on strict laibility, when the verdicts were submitted without special interrogatories to the jury and when no objections to the inconsistent verdicts were made by the Defendant prior to the jury being discharged?

3. Did the Court of Appeals err in holding that as a matter of law the Defendant had no duty to warn of the tipping propensities of the wheeled portable commode to tip forward, thereby setting aside the jury verdict for Plaintiffs on the issues of negligence?

4. Did the Court of Appeals err in failing to make every

reasonable effort to harmonize the inconsistent jury verdicts on the theories of negligence and strict liability, when there were four separate theories of negligence submitted to the jury and the Court of Appeals, without the benefit of special interrogatories from the jury, surmised that the findings of negligence were based on failure to warn?

5. Did the Court of Appeals err by exceeding its limited scope of review of the trial court's denial of a motion for judgment notwithstanding the verdict, when it failed to consider the evidence in the light most favorable to the plaintiffs, when it failed to give the Plaintiffs the benefit of all favorable inferences which may reasonably have been drawn from the facts proven, and when it failed to recognize that reasonable men could differ as to the conclusion to be drawn with regard to the Plaintiffs' submissible case on four separate theories of negligence?

6. Did the Court of Appeals err in substituting its own view of the facts for the trier of fact when it reversed outright the verdict and judgment for plaintiffs on the theory of negligence, and completely ignored the plaintiffs' expert testimony as to the computation of the center of gravity and the tipping propensity of the portable wheeled commode, and in concluding on its own, contrary to the evidence and the jury findings, that the tipping propensity was an "open and obvious danger"?

7. Did the Court of Appeals err in reversing outright the judgment for Plaintiffs and in failing to grant Plaintiffs a new trial where the jury had returned a verdict in favor of Plaintiffs on the theories of negligence, and for defendant on the theory of strict liability?

RULES INVOLVED

Rule 49 of the Federal Rules of Civil Procedure provides:

SPECIAL VERDICTS AND INTERROGATORIES

(a) Special Verdicts. The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the Court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The Court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the Court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the Court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The Court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The Court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the Court shall direct the jury both to make written answers and to

render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the Court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the Court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

STATEMENT OF THE CASE

Preliminary Statement

This is a product liability case in which Plaintiff Edward C. McIntyre sought compensatory and punitive damages on four theories of negligence and on strict liability, arising out of injuries he sustained when he tipped out of a portable wheeled commode Model (5C25) manufactured and sold by Everest & Jennings, Inc. His wife Connie McIntyre sought damages under the same theories for loss of consortium with her husband.

This case presents important and significant questions on submission of dual theories or multiple theories of liability in Federal Court jury trials. The case also presents important questions on the use of special verdicts and special interrogatories to juries, and the scope and nature of proper Appellate review in connection with the use of special interrogatories, special verdicts and multiple submissions of theories to juries. Additionally, this case presents important questions on the availability of punitive damages in product liability cases. The ruling of the Court of Appeals in this case results in imposing upon plaintiffs in product liability cases, a risk of inconsistent verdicts which, under the Appellate Court's ruling in this case, is necessarily fatal to a plaintiff's case, even though the jury returns a verdict in his favor and awards damages. Additionally, this case presents important questions on the availability of punitive damages in product liability cases. Because of the increasing amount of litigation in the field of product liability, and because of the frequency with which product cases are submitted on multiple theories of recovery, the questions presented in this case require resolution by this Court. This Court's review is necessary so that Courts of Appeals and District Courts may be guided in the proper procedure and

review of multiple submissions of liability in jury trials, especially in the area of product liability.

Factual Background

Edward McIntyre is a paraplegic having suffered a spinal cord injury at the T-3, T-4 level. As a result of that spinal cord injury he was paralyzed from the nipple line of his chest. On July 5, 1970, while sitting in the portable commode chair manufactured by Everest & Jennings, Ed McIntyre dropped his toothbrush while in his lavatory. While bending down to pick up his toothbrush, the plaintiff leaned forward in the chair to a point where the back wheels of the commode came off the bathroom floor and the front wheels moved backward. This action caused McIntyre to be thrown forward out of the commode and resulted in the injuries involved in this case.

Robert Birch, a vice president of Everest & Jennings, Inc., had known since 1947 that it was conceivable for a paraplegic to lean forward with the wheels of the commode in an aft position. He also stated that he knew the commode could tip forward and he had that knowledge since 1947. Mr. Bruce Blickensderfer, the president of Everest & Jennings, Inc., knew of the tipping propensity characteristic of the portable wheeled commode since 1947. He stated that he knew of the possibility of tipping the portable wheeled commode if one leaned far enough forward.

There has never been an operation manual furnished with the 5C25 portable wheeled commode from 1947 til the date of the trial of this cause in September, 1976. Even after Everest & Jennings, Inc. knew of the possibility of the tipping when a user leaned too far forward, the defendant chose not to furnish instructions or warnings on the commode in an operation manual or any instructions which could be placed in an owners manual or on the commode.

Prior to July 5, 1970, the defendant had received complaints regarding the tipping propensities of chairs with the same stability characteristics as the 5C25. The Glideabout, a chair for arthritics, had the same dimensions and stability characteristics as the 5C25 portable commode. Another commode known as the Hollywood commode also had the same stability characteristics and front caster arrangement as did the 5C25 commode. Prior to July 5, 1970, the executives of Everest & Jennings knew of the alleged instability of Marie Seiple's Glideabout because she had written a letter and filed a lawsuit alleging such instability when she leaned forward. It was not the normal procedure at Everest & Jennings, Inc. to test any product for alleged instability after receiving notice of such allegations. Before July 5, 1970, a 917 commode with the same forward stability characteristics as the 5C25 commode was alleged to have caused injury to a person from being unstable when the user leaned forward. After notice of Mrs. Young's claim on the 917 commode and Mrs. Seiple's claim on the Glideabout, Everest & Jennings still did not test or consider redesign or modification of the 5C25 which had the same forward characteristics as the other two products.

After receiving notice of alleged instability characteristics of commodes with the same dimensions and front caster arrangement as the 5C25 commode, Everest & Jennings, Inc. made a concious decision not to test either mathematically or mechanically any of their units on which they had received complaints, or units which were similarly designed, including the 5C25 commode.

Mr. Bruce Blickensderfer, president of Everest & Jennings, stated that the defendant's concern was one of utility for the patient rather than safety for the patient. Matthew Hall, an executive for Everest & Jennings, Inc. and a member of the Safety Committee, stated that he did not have a duty to

determine the safety of the product even though it is to be utilized by handicapped persons.

Rudolph Leutzinger testified as an expert witness on behalf of the plaintiff. Leutzinger testified from mathematical calculations in which he computed the center of gravity and the tipping propensities of the portable commode. Leutzinger testified on technical variations of the length of a wheel base on the chair, which would affect the point at which the center of gravity shifts to such an extent that the commode tips forward. The lengthening of the wheel base, according to Leutzinger, directly affects the point at which the commode tips forward, according to mathematical calculations of Leutzinger.

The case was tried to a jury and was submitted to the jury on special verdicts. One special verdict contained the submission on the general rule of strict liability in tort, as stated in §402A of the Restatement 2d of Torts. Additionally, there were four theories of negligence submitted to the jury in one special verdict. The theories of negligence submitted in the negligence instructions were (1) that the commode was unstable by reason of negligent design; (2) that the defendant failed to perform tests on the commode's stability characteristics; (3) that the defendant failed to warn of the tipping propensities of the commode; and (4) that the defendant failed to instruct the user of the risk of tipping when the user leaned too far forward in the commode. Additionally, an instruction on the issue of punitive damages was submitted to the jury.

The jury returned a verdict in favor of Plaintiff Edward C. McIntyre on the issues of negligence, and awarded him compenastory damages in the amount of $15,000. The jury awarded his wife, Connie McIntyre, compensatory damages in the amount of $5,000 on the issues of negligence. The jury also

awarded Edward C. McIntyre punitive damages in the amount of $45,000, and returned a verdict in favor of the defendant on the issues of strict liability. Prior to the District Court discharging the jury in this case, there were no objections made by the defendant to the form of the verdict, or to the inconsistency of the verdict. Neither the District Court nor the defendant made any attempt to ascertain from the jury the basis for its findings for plaintiffs on the issues of negligence.

Following the trial and the jury being discharged the District Court entered an Order Granting Defendant's Motion for Judgment in Accordance with its Motion for Directed Verdict on the Issue of Punitive Damages Only, Denying Defendant's Motion for a Judgment in Accordance with its Motion for a Directed Verdict on the Issue of Actual Damages, and Denying Defendant's Alternative Motion for a New Trial. Plaintiffs appealed from the District Court's order vacating the award of punitive damages. The defendant cross-appealed from the District Court's order refusing to set aside the verdict with respect to compensatory damages.

The Court of Appeals in its opinion found that the two jury verdicts were inconsistent. The Appellate Court, reasoning that the failure to warn was the only possible basis for the verdict on the issues of negligence, found that as a matter of law the risk of tipping in the commode chair was "known, obvious, and apparent" and therefore held that the evidence did not support a recovery for plaintiffs. The Appellate Court, without the benefit of special interrogatories from the jury, reversed the judgment in favor of plaintiffs on the issues of negligence and further declined to reach the issue of whether punitive damages are available in product liability actions. The Appellate Court, in setting aside the jury verdict for plaintiffs, did not order a new trial, but rather, reversed outright and remanded with instructions to enter judgment in favor of the defendant.

REASONS FOR GRANTING THE WRIT

I. This Product Liability Case Presents Issues of Exceptional Importance Regarding the Submission on Theories of Negligence and Strict Liability and Recovery on Only One of the Two Separate Theories.

In this action, Plaintiffs sued on theories of negligence and strict liability, seeking damages for personal injuries sustained by Plaintiff Edward McIntyre when he was tipped out of a portable commode that had been manufactured and sold by the Defendant. The jury returned a verdict in favor of Plaintiffs on the issues of negligence and in favor of the Defendant on the issues of strict liability. Additionally, Plaintiffs were awarded $45,000, punitive damages, which award was set aside by the trial court on Defendant's post-trial motion.

This Court has never before considered the question of inconsistent verdicts on strict liability and negligence in a products liability case. Because of its importance in this case, and because of the trend toward increasing products litigation, it is respectfully suggested that the question presented in this case should be fully reviewed by this Court.

In his opinion on the appeal in this case, Senior District Judge Roy W. Harper, sitting by designation, noted only two published opinions which have addressed the question of inconsistent verdicts on strict liabliity and negligence. The Court in this case stated that it declined to reach the question of whether a finding for the Defendant on strict liability precludes a finding of negligence for Plaintiffs. While the Court of Appeals stated in its opinion that it was declining to rule on this issue, it *did* in a roundabout and indirect manner, reach and rule on that very issue. Since the issue was determined by the Court of Appeals, this Court should review this case and face the question head-on.

There has been an increasing trend in products litigation toward submission of multiple theories of liability. Courts have held that plaintiffs are entitled to have their claims considered on theories of both strict liability and negligence. See for example, *Lindsay* v. *McDonnell Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972): *Jiminez* v. *Sears, Roebuck & Co.*, 4 Cal. 3d 379, 482 P.2d 681 (1971). However, the net result of the Court's decision in this case is to subject plaintiffs to an unwarranted risk when they elect to submit more than one theory of liability to a jury on a products case. As the California Supreme Court recently noted in *Hasson* v. *Ford Motor Company*, 19 Cal. 3d 530, 564 P.2d 857 (1977):

> A finding of inconsistent verdicts in this case would ignore the jury's express finding of negligence, and would render superflous a legal theory submitted to the jury without objection of either party.

The effect of the decision of the Court of Appeals in this case is exactly that which the California Court ought to avoid in *Hasson*. The issue presented here needs to be reviewed by this Court.

II. The Decision of the Court of Appeals Represents a Misapplication of the Provisions of Rule 49 of the Federal Rules of Civil Procedure, and Represents a Complete Departure from the Accepted and Usual Course of Judicial Proceedings in Jury Trials Submitted on Multiple Theories of Liability.

In his opinion, Senior Judge Harper has approached this case as though it were submitted on special interrogatories which were inconsistent with each other. This is not the case. The jury received instructions on two different and separate theories of liability, and were only requested to designate in the form of the verdict the parties for which they found on

strict liability, negligence and punitive damages. The jury was never polled to ascertain the basis for its verdict on either strict liability or negligence, and the inconsistency in the verdicts was not objected to in this case prior to the jury being discharged. Defendant did not raise the inconsistency until its post-trial motions and this appeal. There was no attempt made in the trial court to ascertain the basis for the jury's findings for the Defendant on the issues of strict liability, and further, there was no attempt made by the trial court to ascertain which of the four contentions of negligence the jury relied on in returning a verdict for plaintiffs on negligence. The jury was never requested to divulge its findings on each element of the theories submitted.

On this appeal, the Court of Appeals speculated as to the basis for the jury's verdicts on both theories of liability. It has been assumed by the Court of Appeals that the jury's verdict on strict liability was "predicated on the lack of a defective condition in the commode . . ." This assumption on the part of the Court of Appeals is not supported anywhere in the record. It amounts to nothing more than speculation and conjecture as to the jury's factual findings.

On the appeal in this case, the Court of Appeals speculated that the jury found the portable commode was not defective. There is no such specific finding in the record. On the theory of strict liability the jury was instructed that a verdict for plaintiffs required a finding that the commode was in a "defective condition *unreasonably dangerous to the user or consumer* . . ." Under Missouri law, this is a two-pronged test. The jury might have found that the commode was defective, but was not unreasonably dangerous. The Court of Appeals, in its one-sided speculation, failed to give plaintiffs the benefit of this inference.

The California Supreme Court recently reviewed the two-

pronged requirement of 402A in the case of *Barker* v. *Lull Engineering Co.*, ... Cal. 3d ....., CCH Products Liability ¶8101 (No. 23519, 1/16/78). There the California court reiterated its departure from the essential elements set forth in 402A:

> . . . we rejected the defendant's contention, concluding "that to require an injured plaintiff to prove not only that the product contained a defect but *also* that such defect made the product unreasonably dangerous to the user or consumer would place a considerably greater burden upon him than that articulated . . . . We are not pursuaded to the contrary by the formulation of section 402A which inserts the factor of an 'unreasonably dangerous' condition" into the equation of products liability. CCH Prod. Liab. ¶8101 at 16,648.

In light of the dual test of defectiveness and unreasonable danger which is present in the Missouri rule of strict liability, and on which the jury was instructed, it is impossible to conclude in this case the jury's verdict for the defendant on strict liability was based upon a finding of no "defect." There is no way to ascertain from the record in this case which finding supported the defendant's verdict on strict liability. The jury could have found that the commode was defective, but not unreasonably dangerous, and thus reached its verdict for the defendant under 402A. Therefore the Court should not in this case, allow the defendant's verdict under 402A to be treated as though it were special interrogatories to the jury. See *Ludwig* v. *Marion Laboratories, Inc.*, 465 F.2d 114, 119 (8th Cir. 1972). This erroneous reasoning of the Court in its own decision in this case resulted in assuming that the jury had found the commode was not defective, and therefore eliminated two of the Plaintiffs' four theories of negligence in its attempt to reconcile the "inconsistent" ver-

dicts. Instead, it is suggesetd that similar to the California Court's reasoning in *Hasson, supra,* and *Peters* v. *American Ladder,* ..... F.2d (No. 75-1400, 2/23/76, 1st Cir.). the Court of Appeals should have afforded plaintiffs every reasonable inference in reviewing the "inconsistent" verdicts in this case. The rule as it relates to inconsistent general verdicts is stated at 6A Moore's Federal Practice ¶59.08[4] at p. 59-141 (1977 ed.):

> . . . [B]ut if a verdict for or against a party is proper that verdict should not be set aside because the jury, albeit inconsistently, did not similarly find on another claim . . .

Juries *are* permitted to return inconsistent verdicts. *King* v. *DeutscheDampfs-Gel,* 397 F.Supp. 618 (D.N.Y. 1974), *affd.* 523 F.2d 1042 (2d Cir. 1975), 5A Moore's Federal Practice ¶49.04 (1977 ed.)

III. The Opinion of the Court of Appeals Represents a Departure from Its Own Previous Decisions, and Undermines the Plaintiffs' Right to Trial by Jury, in Its Failing to Grant Plaintiffs a New Trial on the Theories of Negligence and Strict Liability.

Rule 49(b) of the Federal Rules of Civil Procedure provides that when answers are inconsistent with each other, the Court shall "return the jury for further consideration of its answers and verdict or shall order a new trial." The opinion of the Court of Appeals in this case violates the provisions of Rule 49(b) inasmuch as the Court of Appeals considered the special verdicts to be in the nature of special interrogatories. Moreover, the opinion of the Appellate Court amounts to a departure from its own previous decision on inconsistent jury

findings. In *Ludwig* v. *Marion Laboratories, Inc.*, 465 F.2d 114 (8th Cir. 1972) it was held:

> Plaintiff did not object to the answers given to any of the interrogatories prior to the discharge of the jury, neither did he request that the jury be returned to the jury room to reconsider its general verdict or the answers to the interrogatories. *Under these circumstances plaintiff waived any right to now claim any inconsistency in the answers or with the general verdict* . . . the trial court should have been given the opportunity to correct error, if any existed, by resubmitting the matter to the jury. 465 F.2d at 118. (citations omitted, emphasis added.)

No objection to the apparent "inconistent" verdicts was raised by the defendant in this case prior to the jury being discharged. No attempts was made to seek clarification from the jury, as to the basis for its verdicts. Instead, plaintiffs have been subjected to the speculation and second-guessing of an Appellate Court, which has resulted in depriving them of their rights to have the issues of fact decided by a jury. The course of events in this appeal violates Rule 49(b) of the Federal Rules of Civil Procedure. In *Missouri Pacific Railroad Co.* v. *Salazar*, 254 F.2d 847 (5th Cir. 1958), for example, it was held that the jury's findings were so inconsistent that the verdict would not support a judgment. The cause was reversed and remanded for new trial. Even in *Browder v. Pettigrew*, 541 S.W. 2d 402 (Tenn. 1976), where the Tennessee Supreme Court determined that a verdict for the defendant on strict liability and for plaintiff on negligence were contradictory, it was described as "a contradiction which, under the rules, must be resolved by the jury." The case was reversed and remanded for new trial. Also in *Morrison* v. *Frito-Lay, Inc.*, 546 F.2d 154 (5th Cir. 1977) it was determined that:

> . . . [I]n order for a verdict to stand the answers must be consistent and, if not consistent, on appeal the case must be remanded for a new trial. 546 F.2d at 160.

It is therefore clear that there was no basis for the Court of Appeals determining by its own speculation and conjecture that one of four theories of negligence furnished the basis for the jury's verdict on negligence. Petitioners, for the reasons previously set forth in this Petition, suggest that the Appellate Court should not have limited its review of the negligence verdict to the issues of failure to warn or instruct. Four theories of negligence were submitted to the jury, and any one of these may have furnished the jury's basis for its verdict in favor of plaintiffs on the negligence instruction.

IV. The Opinion of the Court of Appeals Represents a Significant Departure from the Acceptable Standard of Review of a Trial Court's Denial of a Motion for Judgment N.O.V.

The Appellate Court overlooked significant evidence in the trial of this case which would support the Plaintiff's verdict on the negligent failure to warn. In considering the question of whether plaintiffs made a submissible case on their negligence theory based upon failure to warn or instruct, plaintiffs are entitled to have all of the evidence viewed in the light most favorable to them, and they are also entitled to rely on all reasonable inferences which can be drawn from the evidence. *Griggs* v. *Firestone Tire & Rubber Co.*, 513 F.2d 851 (8th Cir. 1975), *cert. denied*, 423 U.S. 865 (1975); *Hanson* v. *Ford Motor Co.*, 278 F.2d 586 (8th Cir. 1960); *Russ* v. *Ratliff*, 538 F.2d 799 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977). Although the Court of Appeals has paid lip service

to this rule, it is clear that the rule was not followed in this case, and plaintiffs were not afforded the benefit of all reasonable inferences which could have been drawn from the evidence in this case. In fact, the Court's reasoning amounts to an oversimplificatoin of the issues presented in the trial of this case, and deprives plaintiffs of reasonable inferences drawn from the evidence presented. It is suggested that the Court of Appeals grossly oversimplified the issue in its statement that "it is common knowledge that any chair including a chair with casters, will tip if the seated person leans too far forward." The expert testimony in this case consisted of detailed and technical variations of the length of the wheelbase on a chair which would affect that point at which the center of gravity shifts to such an extent that the commode tips forward. Further, the Court of Appeals overlooked crucial evidence and inferences from the evidence in its statement that plaintiff "received training in the use of a commode with casters, similar to the one at issue. . . ." That statement overlooks all favorable inferences which plaintiff should be afforded in determining the appropriateness of denying a motion for judgment n.o.v. The portable commode of the type on which Ed McIntyre was trained was subpoenaed and was offered into evidence in this case. The Court of Appeals overlooked the crucial difference in the Everest & Jennings commode in question and the Kansas University Medical Center commode which was brought to the courtroom during the trial. The difference in the two commodes consisted of a difference in the length of the wheelbase—the very thing which plaintiff's expert stated is directly related to the forward stability of the commode. Plaintiff's expert testified that the lengthening of a wheelbase increases the forward stability of a chair on casters.

Lastly, with respect to the Appellate Court's conclusion that plaintiffs failed to make a submissible case on failure to warn,

the Appellate Court overlooked substantial changes in the law regarding a manufacturer's liability for dangers which are open and obvious. The Court of Appeals relied upon the duty to warn which was enunciated in the case of *Stevens* v. *Durbin-Durco,* 377 S.W. 2d 343 (Mo. 1964). However, the *Stevens* case was based upon the doctrine previously enunciated by the New York Court of Appeals in *Campo* v. *Scofield,* 301 N.Y. 468, 95 N.E. 2d 802. The *Campo* doctrine, which held that a manufacturer's duty to warn extended only to hidden defects and concealed dangers, has now been rejected by the highest court of New York in the case of *Micallef* v. *Miehle Co.,* 39 N.Y. 2d 376, 348 N.E. 2d 571 (N.Y.App. 1976). The trend away from *Campo* has been significant. *Outboard Marine Corp.* v. *Schupbach,* 561 P.2d 450; *Blaw-Knox Food & Chemical Equipment Corp.* v. *Holmes,* 348 So. 604 (Fla.App. 1977); *Collins* v. *Ridge Tool Co.,* 520 F.2d 591 (7th Cir. 1975). Plaintiffs did, indeed, make a submissible case on the theory of negligent failure to warn or instruct on the proper use of the Everest & Jennings portable commode in question. The Court of Appeals simply overlooked significant portions of the evidence, and failed to draw reasonable inferences therefrom. Moreover, the Court of Appeals overlooked a significant change in the law which had previously been followed in Missouri.

V. The Opinion of the Court of Appeals Conflicts with Recent Missouri Law Which Held That There Is No Legal Inconsistency Between a Verdict for Plaintiff on a Theory of Negligent Failure to Warn, and a Finding for Defendant on a Strict Liability Theory.

On May 1, 1978, the Missouri Court of Appeals for the Kansas City District decided a case which directly applies to the issues addressed in this case. *Rinker* v. *Ford Motor Company,* No. KCD28,550 (Mo. App. 5/1/78) was a product li-

ability action in which the plaintiff was awarded compensatory and punitive damages on a submission of negligent failure to warn. In the same case, the jury returned a verdict for the defendants on the strict liability theory. The Missouri Court of Appeals in the *Rinker* case held:

> We believe the better rule to be that where separate causes of action are joined under the permissive authority of § 509.460 [R.S.Mo.] and tried together, a general verdict will not be held to be fatally defective for inconsistency unless there is error in the pleadings, proof, or submission of the action.
>
> There is no legal inconsistency between a finding against Ford in this case on the negligent failure to warn theory and a lack of finding against Ford and Woods on the strict liability theory. They are separate and distinct theories of liability. What prompted the jury to act as it did in this case is at best a matter of speculation and conjecture. The jury's inquiry did indicate some difficulty with the term "defective" used only in the strict liability submission. The inquiry affords no basis for presuming that the jury failed to follow the Court's instructions. The presumption of course, is that they did. Assuming, as do both appellant and respondent Rinker, that the verdict in favor of Rinker was based upon Instruction No. 4, the jury could correctly arrive at a verdict against Ford on the basis of that instruction, regardless of what conclusion the jury might have reached on the strict liability submissions. The assignment of error is without merit.

This most recent applicable decision of the Missouri Court of Appeals addresses the identical issue as that which was addressed in this case by the United States Court of Appeals for the Eighth Circuit in its opinion filed February 13, 1978,

its Order denying petition for rehearing, and its Order denying the Motion for Reconsideration of Petition for Rehearing. Only five days after the United States Court of Appeals for the Eighth Circuit denied rehearing to these petitioners, the Missouri Court of Appeals entered the *Rinker* decision which would have controlled the issues raised in this case. The opinion of the Eighth Circuit Court of Appeals is inconsistent not only with previous decisions of this Court on the construction of inconsistent verdicts on separate theories of liability, it also completely conflicts with existing law in the State of Missouri. It would therefore only be fitting that this Court review this case, and reconcile the conflicting decisions under state and federal law as set forth above.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully submit that this Petition should be granted and a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 77-1198 and 77-1244

Edward C. McIntyre, et ux.,
Appellants/Cross-Appellees,

v.

Everest & Jennings, Inc., etc.,
Appellee/Cross-Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: November 15, 1977
Filed: February 13, 1978

Before BRIGHT and ROSS, Circuit Judges, and HARPER, Senior District Judge.*

HARPER, Senior District Judge.

Plaintiff, Edward McIntyre, brought this products liability action for compensatory and punitive damages, suing under theories of strict liability and negligence. His wife, Connie McIntyre, joined in this suit seeking damages under the same theories for the loss of consortium with her husband.

This suit was tried before a jury in the United States Dis-

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*The Honorable Roy W. Harper, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

trict Court for the Western District of Missouri, Judge Collinson presiding. A jury verdict was returned in favor of the defendant on the issue of strict liability. With respect to the question of negligence, the jury found in favor of the plaintiffs. Edward McIntyre was awarded $15,000.00, and his wife $5,000.00, as compensatory damages for their injuries. Additionally, the jury awarded $45,000.00 to Edward McIntyre (hereinafter the term plaintiff refers solely to Edward McIntyre) as punitive damages.

Thereafter, the defendant made a motion for a judgment in accordance with its motion for a directed verdict. The defendant's motion was sustained by the trial court with respect to the award of punitive damages, but was denied as to the compensatory damages. The plaintiff appeals from the trial court's order vacating the award of punitive damages. The defendant cross-appeals the trial court's refusal to set aside the verdicts with respect to the compensatory damages.

The plaintiff is a paraplegic, having received a spinal cord injury at the T-3, T-4 level in June of 1968. McIntyre is paralyzed from the nipple line of the chest on down. After receiving rehabilitation training at the University of Kansas Medical Center, McIntyre obtained an over-the-toilet commode chair from the defendant.

The defendant, Everest & Jennings, Inc., is the manufacturer of the commode chair involved herein. The particular commode in question was originally designed in 1941 and has been in production since then. The commode itself is quite simple in design and function, consisting primarily of a chair on caster wheels. Caster locks were available on this particular commode, however the plaintiff chose not to purchase them.

On July 5, 1970, while sitting in the commode chair, plaintiff dropped his toothbrush in the lavatory before him. While

bending down to pick up the toothbrush, the plaintiff leaned forward in the chair to a point where the back wheels of the commode came off the bathroom floor and the front wheels moved backward. This action caused McIntyre to be thrown forward out of the commode and resulted in the injuries involved herein.

The defendant asserts on appeal that the evidence and verdict of the jury establish as a matter of law that the defendant was not negligent. At the outset an apparent inconsistency exists in the special verdicts submitted to the jury. In its verdicts the jury found in favor of the defendant on the theory of strict liability, finding no defect in the commode chair. However, on the issue of negligence, the jury found in favor of the plaintiffs.

Special answers or findings by the jury must be consistent with each other. If they are irreconcilably inconsistent, they destroy each other. It is, however, the duty of the Courts to make ever reasonable effort to harmonize the answers. *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108, 119 (1963); *Ludwig* v. *Marion Laboratories, Inc.*, 465 F.2d 114, 118 (8th Cir. 1972); *Stockton* v. *Altman*, 432 F.2d 946 (5th Cir.), *cert. denied*, 401 994 (1971).

This case was submitted to the jury under the general rule of strict liability in tort as stated in Restatement (Second) of Torts § 402A. That rule has been adopted in Missouri. *Keener* v. *Dayton Electric Manufacturing Co.*, 445 S.W. 2d 362, 364 (Mo. 1969). It provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

The jury herein found that the portable commode chair was not in a defective condition unreasonably dangerous to the consumer. The jury verdict was clearly predicated on the lack of a defective condition in the commode, inasmuch as the other elements to this cause of action, that the defendant was engaged in the business of selling portable commodes, and that the commode reached the consumer without substantial change, were admitted by the defendant.

As to the negligence count, the case was submitted to the jury under four theories: First, that the commode was unstable by reason of negligent design; second, that the defendant failed to perform tests of the commode's stability characterictics; third, that the defendant failed to warn that the commode would tip; and fourth, that the defendant failed to instruct the user of the risk of tipping if the user leaned forward.

Generally, in order to recover under either negligence or strict liability it is necessary to prove that a defect existed in the product at the time the manufacturer parted with possession. *Lindsay* v. *McDonnell Douglas Aircraft Corp.*, 460 F.2d, 631, 636 (8th Cir. 1972). A verdict in favor of the defendant-manufacturer on the issue of strict liability, finding no defect in the product, would in some jurisdictions preclude recovery under the theory of negligence. In *Browder* v. *Pettigrew*, 541 S.W.2d 402, 404 (Tenn. 1976), the court stated:

We agree with counsel that in a products liability action

in which recovery is sought under the theory of negligence, the plaintiff must establish the existence of a defect in the product just as he does in an action where recovery is sought under the strict liability theory or for breach of warranty, either express or implied. The only significant difference is that under the negligence theory the plaintiff has the additional burden of proving that the defective condition of the product was the result of negligence in the manufacturing process or that the manufacturer or seller knew or should have known of the defective condition.

. . . [W]hile proof of a malfunction alone should be sufficient under the strict liability and warranty theories in a products liability case, a higher standard of specificity of proof of defect is required in order to recover under the negligence theory. (citations omitted.)

However, in *Hasson* v. *Ford Motor Co.*, 19 Cal. 3d 530, 564 P.2d 857, 138 Cal Rptr 705 (1977), the California Supreme Court reached a contrary conclusion. Therein the Court held that recovery under a negligence theory is possible where there was no finding of strict liability. Particular emphasis was placed by the California Court on the submission of negligence and strict liability counts to the jury as independent theories, without an instruction to the effect that a failure to find a defect under strict liability necessarily precluded all liability on the defendant's part. *Hasson* v. *Ford Motor, supra,* 138 Cal Rptr at 712.

The Courts of Missouri, the forum state in this diversity action, have not decided this issue. While we are required to apply state law in diversity cases, we are not bound to predict state law developments when it is not necessary to do so. *Edwards* v. *Sears, Roebuck & Company*, 512 F.2d 276, 291 (5th Cir. 175). We decline to establish a rule on this issue,

but rather we hold only that insufficient evidence exists to support a verdict in favor of the plaintiffs on the issue of negligence.

In determining the sufficiency of the evidence, the issue is raised as to whether the state or the federal test of sufficiency of evidence to support a jury verdict should govern in a diversity action in Federal Court. The Supreme Court has declined to resolve this issue. *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 444-45 (1959). This Court, has, however, held in prior diversity cases that where state and federal tests for sufficiency of the evidence are similar and neither party has raised the issue, we hold the state standard to be applicable. *Harwell* v. *Westchester Fire Ins. Co.*, 508 F.2d 1245, 1247 (8th Cir.), *cert. denied*, 421 U.S. 949 (1975); *Gisriel* v. *Uniroyal, Inc.*, 517 F.2d 699, 701 n.6 (8th Cir. 1971). Both parties have argued the case on the basis that Missouri law applied. Missouri state standards for testing the sufficiency of evidence are substantially the same as federal standards. *Meitz* v. *Garrison*, 413 F.2d 895, 896 (8th Cir. 1969); *Lewis* v. *Nelson*, 277 F.2d 207, 210 (8th Cir. 1960).

Review of a trial court's denial of a motion for judgment notwithstanding the verdict is severely limited. In *Griggs* v. *Firestone Tire & Rubber Co.*, 513 F.2d 851, 857 (8th Cir.), *cert. denied*, 423 U.S. 865 (1975), *citing Hanson* v. *Ford Motor Co.*, 278 F.2d 586, 596 (8th Cir. 1960), we held that, in passing upon a motion for judgment n.o.v., the trial court and the Appellate Court are:

> (1) to consider the evidence in the light most favorable to the . . . parties prevailing with the jury; (2) to assume that all conflicts in the evidence were resolved . . . in favor of the [prevailing parties]; (3) to assume as proved all facts which [the prevailing parties'] evidence tends to prove; (4) to give the [prevailing parties]

> the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and (5) to deny the motion if, reviewing the evidence in this light, reasonable men could differ as to the conclusion to be drawn from it.

An Appellate Court may not substitute its view of the facts for that of the trier of fact unless it is in a position to hold that reasonable minds, viewing the evidence in the light most favorable to the prevailing party, could only have found otherwise than the trier of fact. *Russ* v. *Ratliff*, 538 F.2d 799, 804 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

The jury's finding in favor of the defendant on the issue of strict liability precludes a finding of negligent design of an unstable commode or a negligent failure to perform tests of the commode's stability characteristics. The only basis upon which the jury's verdict could lie is either in a failure to warn or instruct on the commode's propensity to tip when the user leaned forward.

With respect to a manufacturer's duty to warn, Missouri has adopted the rule stated in Restatement (Second) of Torts § 388 (1965). *Griggs* v. *Firestone Tire and Rubber Co., supra* at 856; *Morris* v. *Shell Oil Co.*, 467 S.W.2d 39, 42 (Mo. 1971). It provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel

is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Even assuming that the commode can be characterized as "dangerous for the use for which it is supplied," manufacturer's liability here is not proper. "The law does not impose upon manufacturers any duty to warn of many common dangers, for no one needs notice of what he knows or reasonably may be expected to know." *LaPlant* v. *E. I. DuPont de Nemours & Co.*, 346 S.W.2d 231, 245 (Mo. App. 1961).

In *Kerber* v. *American Machine & Foundry Co.*, 300 F.Supp. 1205, 1206 (W.D. Mo.), *aff'd* 411 F.2d 419 (8th Cir. 1969), the trial court stated:

> We believe that the case of *Stevens* v. *Durbin-Durco*, 377 S.W.2d 343, 346-348 (Mo. S.Ct. 1964) correctly states the applicable rule of law:
>
> > "The manufacturer of a product which is potentially dangerous when applied to its intended use (citing cases) or reasonably certain to place life and limb in peril when negligently made (citing cases) is under a duty to a remote user to exercise ordinary care in its manufacture, and is liable to a remote user injured thereby if the injury results from a latent defect bespeaking lack of ordinary care in making the product."
>
> • • •

> "[W]here the danger is open, obvious and apparent, or the user has actual knowledge of the defect or danger, there is no liability on the manufacturer." Under that rule, we do not believe that reasonable men could differ in finding that the danger was not latent or concealed, but on the contrary, it was open, obvious and apparent to all who used it, particularly the plantiff who had—by his own admission—actual knowledge of the danger and an awareness that he could be hurt if he stuck his hand in the uncovered opening.

In *Coleman* v. *Buehner*, 444 S.W.2d 16, 22 (Mo. App. 1969), the Court stated:

> Defendant could not be found negligent in failing tc warn plaintiff of facts of which he had full knowledge. There is no duty to warn a person on the premises of dangers which are known, or are as well known to such person as to the owner or occupant, or which are obvious or should have been observed by such person in the exercise of ordinary care.
>
> Plaintiff was also guilty of contributory negligence as a matter of law for the reason that he intentionally exposed himself to a known and appreciated danger. (citations omitted.)

The plaintiff herein was fully aware of any danger involved in the use of the commode. It is common knowledge that any chair, including a chair with casters, will tip if the seated person leans too far forward. Further, it is well known that chairs with casters will tip more readily with the casters in a trail position than with the casters in the forward position. In testimony before the trial court, the plaintiff acknowledged

that as a part of growing up he was aware that if a person leans too far forward in a castered chair it will tip and the occupant will fall out.

The evidence in this case established that the plaintiff received training in the use of a commode with casters, similar to the one at issue, during his rehabilitation training at the University of Kansas Medical Center. McIntyre also received training in body balance and the limitations of movement due to physical disability. The plaintiff was specifically instructed not to lean forward in a chair because of the hazard of falling. Additionally, McIntyre was provided with, and trained in the use of reaching tongs to allow him to pick up objects without leaning forward.

When the plaintiff acquired the commode involved herein, he elected not to obtain caster locks because he was trained at the medical center to transfer to a commode that did not have caster locks. Thereafter, the plaintiff used this commode daily or every other day for a period of sixteen months prior to his fall without incident. This Court concludes that the risk of tipping in the commode chair was known, obvious, and apparent to the plaintiff.

The plaintiff also seeks to reinstate the jury verdict awarding punitive damages against the defendant. The plaintiff's assertion in this regard raises a novel question under Missouri law as to whether punitive damages are available in product liability actions.

This Court declines to reach this issue because the evidence herein was insufficient to warrant any recovery. In Missouri the plaintiff's inability to make a meritorious case for compensatory damages necessarily precludes recovery of punitive damages. *Porterfield* v. *Burger King Corp.*, 540 F.2d 398, 403 (8th Cir. 1976); *Decker-Ruhl Ford Sales, Inc.* v. *Ford Motor*

Credit Co., 523 F.2d 833, 836 (8th Cir. 1975); *Koenig* v. *Skaggs*, 400 S.W.2d 63, 68 (Mo. 1966).

For the reasons stated above, the District Court's order denying recovery of punitive damages is affirmed. The District Court's order permitting recovery of compensatory damages is reversed, and the case is remanded with directions to enter judgment in this case in favor of the defendant, Everest & Jennings, Inc., with each party to bear its own costs on appeal.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR A DIRECTED VERDICT OF THE ISSUE OF PUNITIVE DAMAGES ONLY, DENYING DEFENDANT'S MOTION FOR A JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF ACTUAL DAMAGES, AND DENYING DEFENDANTS ALTERNATIVE MOTION FOR A NEW TRIAL

(Filed February 15, 1977)

The Court submitted both the issues of actual damages and punitive damages to the jury in this case. The jury awarded the injured plaintiff (the husband) $15,000 actual damages and awarded his spouse $5,000 actual damages. In addition, the jury awarded the husband the sum of $45,000 punitive damages.

The defendant has filed herein a motion for "Judgment in Accordance With Its Motion for Directed Verdict or in the Alternative for a New Trial." On the issues of liability and actual damages the Court has carefully considered all of the points raised in this motion. This is a products liability case and the plaintiffs insisted upon submitting it to the jury both on the theory of strict liability and the theory of negligence. The jury found the issues in favor of the defendant on the strict liability theory and in favor of the plaintiffs on the negligence theory. The defendant strongly urges that these verdicts are inconsistent but have cited no authority directly in point on this bothersome question. The Court does not find any merit in any of the other alleged errors in the trial of the case.

However, the Court has determined from reviewing the evidence, and the governing law of the State of Missouri bearing on the question of punitive damages, that this question should not have been submitted to the jury and that the Court should have granted defendant's motion for a directed verdict at the close of all the evidence on this issue.

Because the jury's finding of liability was based solely upon the theory of negligence, the Court is not faced with the bothersome question of the awarding of punitive damages in a strict liability case, about which so much has been written recently. There are numerous cases in Missouri characterizing the necessary conduct to support an award of punitive damages. In the case of *McClellan* v. *Highland Sales & Investment Company,* 484 S.W.2d 239 (Mo. Sup. 1972), the Court held that to support an award of punitive damages "there must be some element of wantonness or bad motive." In the case of *Warner* v. *Southwestern Bell Telephone Company,* 428 S.W.2d 596 (Mo. Sup. 1968), the Court stated:

> "The acts of a defendant which justify the imposition of punitive damages are those which are willful, wanton, malicious or so reckless as to be in utter disregard of the consequences. Such acts are clearly distinguished from negligence. While they need not always include an intent to do harm, they must show such a conscious disregard for another's rights 'as to amount to willful and intentional wrongdoing.' "

Many other cases could be cited from the Missouri Appellate Courts to the same effect or containing even stronger language. See *Pashalian* v. *Big-4 Chevrolet Company,* 348 S.W.2d 628 (St. L. Ct. App. 1961), which holds that the act "must be

done under such circumstances that the law will imply the evil intent" in order to justify the award of punitive damages.

In this case, the negligence of the defendant cannot be characterized, by any stretch of the imagination, as being wanton, malicious or so reckless as to be in utter disregard of the consequences. Under the controlling Missouri authorities, the Court erred in submitting the issue of punitive damages to the jury and defendant's motion for a judgment on its directed verdict on that issue must be granted.

It is therefore

ORDERED that the defendant's motion for judgment in accordance with its motion for directed verdict is granted on the issue of punitive damages alone and that a judgment notwithstanding the verdict be entered in favor of the defendant on the issue of punitive damages; and it is

FURTHER ORDERED that the defendant's motion for judgment in accordance with its motion for directed verdict on the issue of actual damages be, and is hereby, denied; and it is

FURTHER ORDERED that the defendant's alternative motion for a new trial be, and is hereby, denied.

Dated: 2/15/77

Judgment

This action came on for trial before the Court, Honorable William R. Collinson, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged that the defendant's motion for judgment in accordance with its motion for directed verdict is granted on the issue of punitive damages alone and that a judgment notwithstanding the verdict be entered in favor of the defendant on the issue of punitive damages; and it is

FURTHER ORDERED that the defendant's motion for for judgment in accordance with its motion for directed verdict on the issue of actual damages be, and is hereby, denied; and it is

FURTHER ORDERED that defendant's alternative motion for a new trial be, and is hereby, denied.

Actual damages of plaintiff Edward C. McIntyre assessed at $15,000.00. Plaintiff Connie Ellen McIntyre damages assessed at $5,000.00.

Dated at Kansas City, Missouri, this 15th day of February, 1977.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 77-1198 and 77-1244

Edward C. McIntyre, et al.,
Appellants,

v.

Everest & Jennings, Inc., etc.,
Appellee.

Edward C. McIntyre, et al.,
Appellees,

v.

Everest & Jennings, Inc., etc.,
Appellee.

Appeals from the United States District Court
for the Western District of Missouri

September Term, 1977

The Court having considered petition for rehearing en banc filed by counsel for appellants/cross-appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Judge Lay and Judge Heaney dissent from a denial of petition for rehearing en banc.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

April 25, 1978

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 77-1198 and 77-1244,

Edward C. McIntyre, et al.,

Appellants,

v.

Everest & Jennings, Inc., etc.,
Appellee.

Edward C. McIntyre, et al.,
Appellees,

v.

Everest & Jennings, Inc., etc.,
Appellant.

September Term, 1977

Appeals from the United States District Court
for the Western District of Missouri

Motion of Appellants/Cross-Appellees Edward C. McIntyre et al., for reconsideration of Court's Order of April 25, 1978 denying petition for rehearing en banc and rehearing is denied.

May 16, 1978